UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

OBERTHUR TECHNOLOGIES OF AMERICA CORPORATION

and

LOCAL 14 M, DISTRICT COUNCIL 9, GRAPHIC COMMUNICATIONS CONFERENCE/INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Cases 04-CA-128098
04-CA-132055
04-CA-134781 and
04-CA-158860

RESPONDENT OBERTHUR TECHNOLOGIES OF AMERICA CORP.'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, Respondent Oberthur Technologies of America Corp. respectfully files the following Cross-Exceptions to the Decision of the Honorable Arthur Amchan, Deputy Chief Administrative Law Judge in the above captioned matter:

1. To the failure to find, at page 8 of the Decision, that the Union waived any right to bargain with regard to Respondent's terminations of employees Albert Anderson, Lawrence Bennethum, Dan Clay, and Harvey Werstler, and the resultant finding that Respondent violated Section 8(a)(1) and (5) of the Act by not bargaining with the Union subsequent to the terminations.

The grounds for Respondent's cross-exceptions are set forth in the accompanying Brief.

Respectfully submitted,

Dated: July 28, 2016

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The Respondent, Oberthur Technologies of America Corp. ("Oberthur" or "Employer"), hereby submits this Brief in support of its Cross-Exceptions to the Decision issued by Administrative Law Judge Arthur J. Amchan in the above-captioned matter.

STATEMENT OF THE CASE

A. Statement of Facts

This case arises out of Oberthur's termination of four employees for flagrant violations of long-established workplace policies. The employees[1] at issue were terminated for, respectively, operating a forklift in an unsanctioned and unsafe manner, fighting, and using racially offensive language.

On September 7, 2012, a representation election was held among a unit consisting of production and maintenance employees at Oberthur's Exton, Pennsylvania facility. G.C. Exhibit 2. That election resulted in 108 votes in favor of representation by Local 14M, District Council 9, Graphic Communications Conference/International Brotherhood of Teamsters (the "Union"), 106 votes against, and three challenged ballots. *See Oberthur Technologies of America Corp.*, 362 NLRB No. 198 (2015). Following a hearing held in November 2012, Administrative Law Judge Raymond P. Green sustained two of the challenges and overruled the third. *Id.* Judge Green's decision was issued on February 20, 2013, and was the subject of exceptions by Oberthur.

On March 11, 2013, John Potts, Secretary/Treasurer of Local 14 of the Union demanded that Oberthur begin Collective Bargaining negotiations with the Union. G.C. Exhibit 2A. Four (4) days later, on March 15, 2013, Timothy R. Feely, General Counsel for Oberthur, responded

[1] The four former employees are Dan Clay, Harvey Werstler, Albert Anderson and Lawrence Bennethum. Those individuals will be collectively referred to herein as the "Discharged Employees."

to the Union's demand to bargain, explaining that Oberthur intended to appeal the ALJ's decision and would not begin Collective Bargaining negotiations until the ALJ's decision was finally decided. G.C. Exhibit 2(b). Judge Green's decision was ultimately affirmed by the Board pursuant to a decision issued on August 27, 2015. In connection with that decision, the Board issued a Certification of Representative.

The Certification of Representative was issued subsequent to each of the terminations at issue in this case, which resulted from three separate incidents occurring in 2014 and 2015. The circumstances of each of the terminations at issue are as follows:

Discharge of Albert Anderson

On or about February 7, 2014, Albert Anderson was discharged along with another employee, Emory Flowers, as a result of their intentional misconduct in using their forklift to lift another employee at least 15 feet in the air to conduct a year-end inventory. According to Oberthur's witnesses, Kurt Johnson, Human Resources Manager for Oberthur, and Nancy Kelly, former Safety Director, the actions of Anderson and Flowers clearly violated the safety training they both were provided, as well as the OSHA Standard for Safe Handling of Forklifts. TR. at 49-56. Indeed, as explained by Johnson and Kelly, both employees were trained, as required by OSHA, under 29 C.F.R. § 1910.178, in the safe use of a forklift in the workplace. TR. at 102. On page 10 of the training materials provided to both Anderson and Flowers, it expressly states that a forklift should never be used to carry people. *See* G.C. Exhibit 7. Moreover, as made clear in the video that was explained by Nancy Kelly, both Anderson and Flowers engaged in an egregious act of misconduct by using a forklift to hoist another employee 10-15 feet in the air without any appropriate cage or harness. TR. at 102-106. According to Kelly, such practice not only violated OSHA's regulations and Oberthur's workplace standards, it also exposed the

employees to serious injury and possibly death, either by falling from the raised forklift or having materials fall on the employee who was standing on the forklift as it moved about the plant. *Id.*

Kurt Johnson explained why both individuals were discharged and the process he went through in making that determination. TR. at 49-56. Johnson explained that because of the serious nature of the violation, both men were discharged. Johnson also explained that other employees who have violated Oberthur's workplace safety policies have also been terminated, including Kevin McMurray. TR. at 57-59; Employer's Exhibit 1. Johnson explained that McMurray was discharged because he attempted to move a large file cabinet in an unsafe manner which subsequently fell on him, potentially causing serious injury. McMurray was discharged on January 15, 2015. *Id.* Johnson testified that Oberthur has a "zero tolerance" policy with regard to unsafe work practices. TR. at 82.

On March 13, 2014, John Potts, the Union representative, wrote to Oberthur's counsel and specifically requested that "the Company provide us with the documentation concerning these terminations to include any disciplinary actions that led to the termination and the Company policy and disciplinary steps for which the terminations were based." G.C. Exhibit 5.

The letter went on, indicating that the Union requested "any notes of the investigatory meetings along with written reports generated by the Company's Human Resources department during its investigation." G.C. Exhibit 5.

Oberthur's counsel responded on March 18, 2014, that a response would be forthcoming. G.C. Exhibit 6.

On July 17, 2014, counsel responded to the Union's request for information by letter. G.C. Exhibit 7.

In that letter, counsel explained the nature of the investigation, the seriousness of the misconduct, and the reasons for the discharge. Counsel also provided the Union with a copy of a video which documented the clearly unsafe work practice of Anderson and Flowers, along with all of the training materials that both Flowers and Anderson had been required to comply with. *Id.*

Following receipt of that July 24th letter, Potts, the Union Representative, admitted that he reviewed the letter and the information attached to it and never requested to bargain with Oberthur over the discharge of Anderson. TR. at 38-39. In fact, Potts acknowledged that he had reviewed all of the information and never requested any additional information from Oberthur. *Id.*

Discharge of Dan Clay and Harvey Werstler

On or about July 14, 2014, Dan Clay and Harvey Werstler were discharged by Oberthur for fighting in the workplace. TR. at 31. By letter dated July 24, 2014, Potts again requested that Oberthur provide the Union with documentation concerning the terminations of the two, any disciplinary actions that led to the termination and the Company policy and disciplinary steps for which the terminations were based. G.C. Exhibit 8. As with Anderson, Potts did not request to bargain with Oberthur over the discharge, but only requested information. *Id.*

On August 11, 2014, Oberthur's counsel responded to Potts' July 24, 2014 letter, and provided a full explanation for why Clay and Werstler were fired. G.C. Exhibit 9. The two had gotten into an argument in the workplace with Clay calling Werstler a "mother fucker" along with other inappropriate language. Werstler admitted calling Clay a "son-of-a-bitch." *Id.* During the heated argument, Clay pushed Werstler at least three (3) times in the chest and

Werstler responded with his own pushing. Both admitted that they had engaged in that misconduct. G.C. Exhibit 9.

At the hearing, Kurt Johnson described the circumstances surrounding the termination of Clay and Werstler and explained that both were fired for fighting in the workplace. TR. at 76-81. Johnson stated that others at Oberthur had been fired for similar misconduct, including Chris Abdalla and Wayne Davis, as well as Juan Medina, all three (3) of whom were discharged for fighting in the workplace. TR. at 76-82. Johnson explained that Oberthur has zero tolerance for violence in the workplace and that both Clay and Werstler were summarily discharged for violating that policy. TR. at 82.

With regard to the discharges of Clay and Werstler, Potts acknowledged that he had all the information that he had requested but never asked to bargain with Oberthur over those discharges. TR. at 41.

Discharge of Lawrence F. Bennethum

On July 27, 2015, Lawrence F. Bennethum was discharged by Oberthur for making a racial slur in the workplace. G.C. Exhibit 10. According to Kurt Johnson, when Bennethum was asked by another employee to get a hair bonnet for a third employee, Bennethum's response was "did the color of my skin change." TR. at 60-61. Johnson explained that several of the employees who were present and heard the offensive comment were offended by it and complained to Johnson about it. TR. at 63. Johnson explained that Oberthur has a "zero tolerance" policy with regard to discrimination or unprofessional, rude behavior in the work place. TR. at 83. Following an investigation and interviews with all of the witnesses present, Bennethum was discharged for making the highly offensive, racially charged comment in the workplace. Johnson also explained that other Oberthur employees have been terminated for

similar misconduct, including Marcellus Barnett. TR. at 64-65. Barnett was terminated for writing on a board, "this is the light skinned section." *See* Employer's Exhibit 2. Johnson explained that Barnett was discharged for those racially charged comments. *Id.*

Johnson also stated that another Oberthur employee, Robert Hoffman, had been discharged for referring to another Oberthur employee as a "monkey." TR. at 68-70. Johnson explained that Oberthur has a zero tolerance with regard to any employee making racially offensive comments in the workplace.

Finally, another Oberthur employee, Hans Vorhauer, was also discharged for making a Nazi salute in the workplace that others found offensive. TR. at 72-73.

Johnson also explained that another employee, Steve Domsohn, was also discharged for making an offensive comment to a female Oberthur employee to the effect "bend over and I'll show you." TR. at 75-77, as was Michael Evans. TR. at 77.

On October 9, 2015, John Potts, Union Representative, wrote to Oberthur's counsel, requesting that Oberthur provide the Union with documentation concerning the termination of Bennethum. G.C. Exhibit 10. Nowhere in the October 9, 2015 letter did Potts request bargaining over the discharge of Bennethum. In response to questioning by the Union's counsel, Potts reiterated that he never requested bargaining over any of the discharges and, up to the present, never bargained over those discharges. TR. at 37. Instead, Potts stated that he chose to file an unfair labor practice charge. TR. at 39.

B. Procedural History

The first of the charges at issue in this case (Case 04-CA-128098) was filed by the Union on May 6, 2014. The Union thereafter filed charges in Case 04-CA-132055 on July 2, 2014, in Case 04-CA-134781 on August 15, 2014, and in Case 04-CA-158860 on August 26, 2015. An

Amended Charge was filed in Case 04-CA-158860 on October 20, 2015. The cases were consolidated pursuant to an order issued by the Regional Director on October 27, 2015. In brief, the Complaint alleges that Oberthur violated Section 8(a)(1) and (5) of the Act by terminating the Discharged Employees without providing the Union notice and an opportunity to bargain and by delaying in its satisfaction of a request by the Union for information relating to the termination of Albert Anderson.

A hearing was held before Administrative Law Judge Arthur Amchan on April 13, 2016 in Philadelphia, Pennsylvania. Judge Amchan issued his Decision on June 16, 2016. The General Counsel filed Exceptions, along with a supporting Brief, on June 30, 2016. The Union filed Exceptions, along with a supporting Brief, on July 14, 2016. Pursuant to 29 C.F.R. 102.46(e), Oberthur has timely filed its Cross-Exceptions.

QUESTION PRESENTED

> Was Judge Amchan's finding that Oberthur violated Sections 8(a)(1) and (5) by failing to bargain with the Union following the terminations of the Discharged Employees in error given the uncontroverted evidence that the Union never requested to bargain concerning the terminations?

ARGUMENT

I. The Administrative Law Judge erred by declining to find that the Union waived any right to bargain subsequent to the terminations in light of the Union's undisputed failure to ever request bargaining with regard to the terminations.

In recognition of the fact that the Board's *Alan Ritchey*[2] decision was invalidated by the Supreme Court in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), Judge Amchan concluded that Oberthur was not obligated to notify the Union in advance and offer the opportunity to bargain

[2] 359 NLRB No. 40 (2012).

prior to terminating the Discharged Employees.[3] Judge Amchan went on to conclude, however, that Oberthur violated the Act by failing to bargain with the Union subsequent to the terminations. That finding of a violation is untenable given (1) Judge Amchan's acknowledgement that an employer is bound to bargain regarding disciplinary matters "upon request," and (2) the uncontroverted evidence that the Union never requested to bargain concerning the termination of any of the Discharged Employees.

The controlling precedent with regard to an employer's alleged violation of Section 8(a)(5) based upon the failure to bargain concerning employee discipline is *Fresno Bee*, 337 NLRB 1161 (2002). In that case, the Board affirmed the administrative law judge's conclusion that where an employer applies preexisting employment rules to discharge an employee, such action does not constitute a "unilateral change in lawful terms or conditions of employment." *Id.* at 1186-87. As a result, the employer "has no obligation to notify and bargain to impasse with the Union before imposing discipline." *Id.* at 1187.

Fresno Bee went on to note that subsequent to such a termination, the employer "has an obligation to bargain with the Union, upon request." *Id.* The administrative law judge went on to explicitly note in that "[a] union may, however, waive its right to bargain about a mandatory subject if it does not request bargaining." *Id.*

In the instant case, it is undisputed that the Union never requested to bargain with Oberthur concerning the terminations of any of the Discharged Employees. TR. at 37-41. Notwithstanding that failure, Judge Amchan concluded that Oberthur nevertheless violated the

[3] That portion of Judge Amchan's Decision is the subject of Exceptions filed by Counsel for the General Counsel and by the Union. For the reasons fully set forth in Oberthur's *Answering Brief to Exceptions Filed by Counsel for the General Counsel and by the Charging Party*, that portion of Judge Amchan's Decision represents a proper application of Board precedent and should not be disturbed.

Act by failing to bargain subsequent to implementing the terminations. The Decision sets forth four interrelated grounds for that conclusion, none of which can support Judge Amchan's finding that the Union did not waive any right which it may have had to bargain with regard to the terminations.

A. Oberthur's Refusal to Negotiate a Contract Prior to Certification of the Union as the Bargaining Representative Did Not Excuse the Union's Failure to Request Bargaining.

In concluding that the Union did not waive the right to bargain, Judge Amchan first cited to the fact that Oberthur had declined a demand for contract bargaining issued by the Union shortly after the issuance of the administrative law judge's decision in the representation proceeding. Oberthur's decision to decline the Union's demand for contract bargaining was, however, entirely lawful, as Judge Amchan himself acknowledged in the Decision. *See* Decision at 7 n.5. No valid basis exists to conclude that an employer's refusal to bargain over a contract prior to certification constitutes a blanket refusal to bargain with regard to future terminations. Indeed, the Judge's finding would necessarily lead to the lawful refusal to negotiation a contract pending certification being transmuted into a violation of the Act in virtually any instance where a termination of employment occurs while certification remains pending. Such a result is particularly unwarranted here given that the first of the terminations at issue in this case did not take place until eleven months after the communications between Oberthur and the Union with regard to the demand for contract bargaining.

B. The Fact That Oberthur Did Not Notify the Union of the Terminations Did Not Excuse the Union's Failure to Request Bargaining.

The next item cited by Judge Amchan in concluding that the Union did not waive any right to bargain was the fact that Oberthur did not notify the Union of the terminations. That

fact, however, had no bearing on the potential for bargaining, however, as Oberthur subsequently received – and responded to – requests for information from the Union concerning the terminations. Despite receiving that information from Oberthur, the Union thereafter made no request that Oberthur engage in any bargaining with regard to the terminations. TR. at 37-41.

C. Oberthur's Statement That It Did Not Concede That It Was Under a Duty to Provide Information Did Not Excuse the Union's Failure to Request Bargaining.

Judge Amchan next invoked the fact that in its responses to the Union's requests for information, Oberthur noted that by providing the information requested, it was not conceding that it was under an obligation to provide that information. From that fact, and notwithstanding Oberthur's compliance with the requests for information, Judge Amchan extrapolated that Oberthur had signaled that it would be unwilling to bargain such that the Union was relieved of any obligation to request bargaining. That conclusion simply does not follow. The fact that Oberthur, in complying with one type of request, reserved its position that it was not obligated to comply, in no way amounted to a refusal to comply with a different (and unstated) request. *Cf. Haddon Craftsman, Inc.*, 300 NLRB 789, 790 (1990) (noting that union representative's "subjective impression of the Respondent's state of mind, taken alone, did not excuse the Union from testing the Respondent's good faith with a demand to bargain").[4]

Moreover, Judge Amchan's reasoning on this point begs the question of why – if Oberthur's response to the first request for information amounted to a blanket refusal to engage

[4] The sole authority cited by Judge Amchan in connection with his conclusion that the Union's request to bargain would have been futile, *Sunnyland Refining Company*, 250 NLRB 1180 (1980), is inapposite. *Sunnyland* involved an argument by the employer that the union had waived its right to bargain over a contract by not making a subsequent request for bargaining after a prior request for contract bargaining had been rejected by the employer. *Id.* at 1180-81. Here, the Union never requested bargaining concerning the terminations despite receiving responses from Oberthur to its information requests.

with the Union – the Union nevertheless issued additional requests for information concerning the subsequent terminations.

D. Judge Amchan's Suggestion That Oberthur was Obligated to Request Bargaining Is Entirely Contrary to Board Precedent.

Finally, Judge Amchan concluded that "if Respondent was willing to negotiate with the Union about the discharges, it was Respondent's obligation to so inform the Union in light of its previous refusal to recognize and bargain with the Union." *See* Decision at 8. That statement is entirely contrary to established Board precedent. As cited by Judge Amchan earlier in his Decision, under *Fresno Bee* any obligation by an employer to bargain subsequent to a termination arises "upon request." *Id.* at 7. There is simply no authority for the proposition that an employer's lawful refusal to engage in contract bargaining pending certification operates to shift to the employer the obligation to initiate the process of bargaining with regard to the termination of an employee. Judge Amchan's conclusion on this point is entirely contrary to the controlling precedent of *Fresno Bee*.

In sum, it is undisputed that the Union never requested bargaining with regard to any of the terminations at issue in the Complaint. By failing to ever request that Oberthur bargain with regard to the terminations, the Union has waived any bargaining right. Judge Amchan's finding that Oberthur violated Sections 8(a)(1) and (5) by failing to bargain over the terminations should therefore be reversed.

CONCLUSION

For the reasons set forth above, Respondent Oberthur Technologies of America Corp. respectfully requests that the Board find that the Administrative Law Judge erred in failing to find that the Union waived any right to bargain with regard to the terminations of the Discharged

Employees and in finding that Oberthur violated Sections 8(a)(1) and (5) by failing to bargain with regard to the terminations.

Respectfully submitted,

Dated: July 28, 2016

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